No. 10-691

In the Supreme Court of the United States

ALLIANCE LOGISTICS, INC.,
N/K/A ALLIANCE 3PL CORP.,

Petitioner,

v.

NEW PRIME, INC., D/B/A/ PRIME INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit's reversal of the jury verdict in this case was based on an insufficiency of the evidence issue not raised in a Rule 50(a) motion for judgment as a matter of law.

RULE 29.6 STATEMENT

Respondent New Prime, Inc. does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner Alliance Logistics, Inc. ("Alliance") challenges the Seventh Circuit's unanimous reversal of a jury verdict on a state-law breach of contract claim. The petition asks whether such a reversal may be "based on a sufficiency of evidence issue not raised in a Federal Rule of Civil Procedure 50(a) motion for judgment as a matter of law."

That may be an appropriate question in some case, but not this one. Here, the Seventh Circuit reversed the jury verdict on a ground expressly raised by respondent New Prime, Inc. ("Prime") in its Rule 50(a) motion, as well as in its Rule 50(b) motion and in its appellate briefs. The petition mischaracterizes both the Seventh Circuit's opinion and the record below in a futile attempt to fabricate a federal question.

Furthermore, if Alliance had a viable basis for raising its Rule 50(a) forfeiture argument, it should have done so in its Seventh Circuit brief. Alliance forfeited its forfeiture argument by raising it for the first time in its petition for rehearing, as the Seventh Circuit ruled in denying that petition.

Factual Background. Prime is a nationwide trucking carrier based in Missouri. Alliance is a third party logistics provider based in Illinois. Alliance does not own trucks; it contracts with shippers to move their goods through carriers such as Prime.

Prime and Alliance entered into a Carrier-Shipper Transportation Agreement ("Agreement"). The Agreement, which designated Prime as "Carrier" and Alliance as "Shipper," contained a "back-solicitation clause," stating:

> Carrier shall not solicit traffic from any shipper, consignee, or customer of Shipper where Carrier first knew the availability of such traffic as a result of Shipper's efforts or the traffic of Shipper, consignee, or customer of the Shipper was first tendered to Carrier by Shipper.

C.A. App. at 17 ¶ 11. Alliance sued Prime in federal district court, invoking diversity jurisdiction and claiming that Prime violated the back-solicitation clause by soliciting the business of Loders Croklaan USA ("Loders"), a shipper that was under contract with Alliance for the provision of bulk transport services. R. 1.

The parties disputed the meaning of two key terms in the back-solicitation clause—"solicit" and "traffic." With respect to "traffic," Prime argued that its meaning was plain and unambiguous, namely, "things being transported to and from along a route," the definition offered by Alliance's CEO Dan Rimkus at trial. Tr. II:49. Alliance's view, as its petition states, was that "traffic" meant something else entirely, namely, "management of a shipper's logistics." Pet. at 5.

After the parties presented their cases at trial, the jury returned a verdict in favor of Alliance on Count 1 (breach-of-contract) and in favor of Prime on Count 2 (tortious interference), awarding Alliance damages of over $2.1 million.[1]

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[1] Petitioner asserts that "the jury agreed with Mr. Rimkus that 'traffic' * * * included the management of Loders's logistics." Pet. at 6. In fact, the jury simply found for Alliance on Count I. There were no special findings that would indicate what the jury thought about Rimkus's testimony.

Prime unsuccessfully moved for judgment as a matter of law at the end of plaintiff's case (R. 117), as well as at the close of evidence (Tr. VI:37). After trial, Prime renewed its motion for judgment as a matter of law (R. 137), which again was denied. Prime then appealed from the Count 1 verdict, and the Seventh Circuit panel (Chief Judge Easterbrook and Judges Kanne and Rovner) unanimously reversed. Pet. App. at 3a-10a. Alliance's petition for rehearing and rehearing en banc was denied without dissent. *Id.* at 1a-2a.

REASONS FOR DENYING THE PETITION

The predicate for the purported federal question raised in the petition is inaccurate. The Seventh Circuit's ground for reversing the jury verdict rested on the same points raised by Prime in its two Rule 50 motions and in its appellate briefs.

I. Alliance Mischaracterizes The Seventh Circuit's Ruling.

A summary of the court of appeals opinion that "seriously mischaracterizes" the holding of the court below is "ordinarily fatal to the petition." Eugene Gressman et al., SUPREME COURT PRACTICE 506 (9th ed. 2007). Alliance's petition mischaracterizes the ruling below by asserting that the Seventh Circuit agreed with Alliance that the term "'traffic' was ambiguous." Pet. at 7. According to Alliance, the Seventh Circuit "reversed the jury verdict because Alliance supposedly failed to provide any evidence regarding the meaning of 'traffic.'" *Ibid.*

In fact, the Seventh Circuit's ruling was based on the plain meaning of "traffic" in the back-solicitation clause. The court of appeals first noted that "Prime relies on the ordinary meaning of the word 'traffic'

plus the ordinary function of a clause such as this one." Pet. App. at 8a. The court then explained that "Prime's straightforward position has the support of Illinois law, which supplies the rule of decision: Illinois understands non-compete clauses to cover no more than the reasonable import of their language and does not allow expansive readings of restrictive covenants." *Id.* at 8a-9a. This "rule of decision" mandated judgment for Prime based on the plain meaning of "traffic." The Seventh Circuit's view thus coincided with Prime's "straightforward position."

The court of appeals proceeded to explain that a party can argue against such "a straightforward understanding of contractual language" by means of "parol evidence" or "usage of trade." Pet. App. at 9a. But the court noted that Alliance had offered no evidence on either point. "Alliance did not offer any parol evidence" about the meaning of "traffic" during contract negotiations, and "Alliance denies that its expert testified about usage of trade." *Ibid.* Instead, Alliance offered only "oral argument" from "Alliance's lawyer." *Ibid.* Applying the plain meaning of "traffic," the Seventh Circuit concluded as a matter of law that Prime did not violate the back-solicitation clause because it knew of the availability of Loders' traffic prior to its entering into a relationship with Alliance. *Id.* at 10a.

Thus, the Seventh Circuit's ruling rested on the plain and unambiguous meaning of "traffic" and on Alliance's failure to present evidence to override that plain meaning. Alliance both mischaracterizes that ruling and improperly deems it "*sua sponte*." Pet. at 12. There was nothing "*sua sponte*" about the Seventh Circuit's ruling. As shown in the next Part, Prime's two Rule 50 motions, as well as its appellate

brief, argued for judgment as a matter of law based on both the plain contractual meaning of "traffic" and the lack of evidence to override that plain meaning.

II. Prime Argued That The Evidence Was Insufficient To Override The Plain Meaning Of "Traffic" In Its JMOL Motions And Appellate Briefs.

Alliance asserts that "Prime never raised a sufficiency of the evidence issue regarding 'traffic' in its Rule 50(a) Motion for JMOL or Rule 50(b) Renewed Motion for JMOL (or even it its appellate brief)." Pet. at 8; see also *id.* at 5-6, 11-12. Instead, according to Alliance, Prime argued only that the term "traffic" was "unambiguous." *Id.* at 5. Those assertions are flatly incorrect.

A. Rule 50(a) motion

Prime argued in its Rule 50(a) motion at the end of plaintiff's case that it was entitled to judgment as a matter of law because, *inter alia*, the meaning of "traffic" was unambiguous and the evidence was insufficient to show otherwise.

After addressing the plain meaning of "traffic" in the back-solicitation clause, Prime's motion cited "uncontroverted" and "uncontradicted" evidence supporting that plain meaning: "The uncontroverted testimony of Mr. Wilkins and the plaintiff's Supplemental Answers to Interrogatories clearly establish that Prime's hauling of goods, particularly the bulk traffic, to and from Loders prior to the contract between Alliance and Loders constituted 'traffic.'" R. 117 at 5. Prime's motion further stated that "Prime has produced uncontradicted documentary evidence and testimony regarding this traffic." *Ibid.*

B. Rule 50(b) motion

Prime reiterated that argument in its Rule 50(b) motion after the jury verdict. After arguing that the meaning of "traffic" in the back-solicitation clause was unambiguous, Prime cited "[t]he evidence submitted at trial" to support its position on the meaning of key contract terms, including "traffic." For example, Prime cited the "[t]estimony of Jim Wilkins" to show that "[t]he transportation of Loders' products to and from Loders' facility is called 'traffic.'" R. 137 at 4. Prime concluded that "the evidence failed to establish that it breached its duty *under the contract terms*." *Id.* at 5 (emphasis added). This record refutes Alliance's contention that Prime never made a sufficiency of the evidence argument regarding the meaning of "traffic."

Indeed, Alliance directly responded to Prime's sufficiency of the evidence argument. Alliance's response to Prime's Rule 50(b) motion specifically stated: "Jim Wilkins' testimony that the transportation of Loders' goods to and from Loders' facility constituted traffic is *controverted* by the testimony of Alliance's CEO and owner, Dan Rimkus, that traffic in the trucking industry includes the logistics that is required to transport those goods." R. 141 at 4 (emphasis added). Alliance's response to Prime's evidentiary argument cannot be reconciled with Alliance's assertion to this Court that Prime never made the evidentiary argument at all.

C. Seventh Circuit appeal

On appeal, Prime again argued that the meaning of "traffic" in the back-solicitation clause was clear and unambiguous and that Alliance had submitted no evidence sufficient to override that plain meaning.

First, the Statement of Facts in Prime's opening brief describes how the issue was debated at trial, citing to trial testimony:

> The parties also disputed what constituted the "traffic" that, to breach the back solicitation clause, Prime had to "first kn[o]w of" as a result of Alliance's efforts or had to have been "first tendered" to Prime by Alliance. See A17 ¶ 11. The parties mutually agreed that there was no negotiation over that term before the Agreement was executed. Tr. IV:13. Alliance contended that "traffic" means "the same thing" as "logistics" and must be bulk tanker traffic and quantitatively substantial. Tr. II:49, 81-82; Tr. VI:45, 48. Prime contended, in contrast, that the Agreement places no such limits on the meaning of "traffic," the plain meaning of which is the carriage of loads from one place to another. Tr. III:218. There was no dispute over the underlying facts that Prime had carried 124 loads of packaged goods and 13 bulk tanker loads for Loders *before* Alliance had arranged for Prime to carry any loads for Loders. Tr. II:149; Tr. III:165; Tr. IV:50-52, 67-68, 93-94; Tr. V:14. The parties instead disputed whether to characterize Prime's prior loads for Loders as "traffic."

Prime's C.A. Opening Br. at 12-13.

In the Argument section of Prime's opening brief, after arguing that the meaning of "traffic" is plain and unambiguous, Prime addressed the insufficiency of Alliance's attempt to override that plain meaning. For example, Prime responded to testimony from Alliance's CEO, Dan Rimkus, and to other evidence

seeking "to limit the meaning of 'traffic' to 'logistics work' involving a large (but unspecified) number of loads carried in bulk tankers pursuant to a long-term contract." Prime's C.A. Opening Br. at 24, citing Tr. II:49, 81-82; VI:45-6, 48, 68. Prime countered with other testimony from Rimkus defining traffic as "things being transported to and from along a route." *Ibid.*

Furthermore, Prime rebutted Alliance's contention "that the preexisting loads were not 'traffic' because they were 'de minimis' or did not originate at Loders or were not carried with particular equipment." Prime's C.A. Opening Br. at 27. Prime argued that "when pressed, Alliance's CEO had to admit that no such limitations appear in the Agreement. Tr. II:57." *Ibid.*

Alliance's appellee brief responded to these evidentiary arguments, stating that Rimkus "testified that 'traffic' includes the logistics management that is required to transport the goods." Alliance's C.A. Br. at 33. Prime's reply brief then summarized this back-and-forth by stating: "Alliance offers no viable reason to deviate from the plain meaning of the Agreement itself." Prime's C.A. Reply Br. at 4.

The foregoing refutes Alliance's assertion that the Seventh Circuit based its decision "on an issue that was never contemplated by the parties and never briefed in the district court or on appeal." Pet. at 14. Thus, Alliance has no basis for its contention that the Seventh Circuit ruling was "[i]n direct violation" of this Court's precedents applying Rules 50(a) and 50(b). *Id.* at 13. The only federal issue raised by Alliance's petition is not an issue in this case.

III. The Seventh Circuit Correctly Ruled That Alliance Forfeited Its Forfeiture Argument.

In denying Alliance's petition for rehearing and rehearing en banc, the Seventh Circuit noted that Alliance had "forfeited" its "forfeiture argument" that Prime had not argued insufficiency of the evidence as to the meaning of "traffic" in its Rule 50 motions in the district court. Pet. App. at 2a. The court of appeals explained that Alliance's forfeiture argument "was omitted from appellee's brief even though appellant requested an outright reversal under Rule 50 as well as a new trial." *Ibid.*

Alliance responds that it cannot have "prognosticated" an issue that was "never raised" in Prime's Rule 50 motions or appellate brief, and it claims that the Seventh Circuit's "fundamentally unfair logic" deprived it of "due process." Pet. at 16. But Alliance was not blindsided by the Seventh Circuit's ruling on the meaning of "traffic." As demonstrated above, that ruling was based on the same points raised in Prime's Rule 50 motions and appellate briefs—the plain meaning of "traffic" in the back-solicitation clause and the lack of evidence to override that plain meaning.

Alliance did not suggest in its appellee brief that Prime had failed to fulfill the requirements of Rule 50. By first raising that argument in its rehearing petition, Alliance "forfeited" it for purposes of rehearing, as the Seventh Circuit properly ruled. See *Indiana Gas Co.* v. *Home Ins. Co.*, 141 F.3d 314, 321 (7th Cir. 1998) ("An argument made for the first time in a petition for rehearing has been forfeited"). For that same reason, Alliance also waived its argument for purposes of this Court's review. See *Wills* v. *Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in de-

nial of petition for certiorari) ("the traditional practice of this Court [is] to decline to review claims raised for the first time on rehearing in the court below"); *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984) (concession that argument was first raised on rehearing "precludes our consideration").

* * *

Without a link between the purported federal question raised in the petition and what actually happened in this case, Alliance is left with only a routine ruling on a purely state-law contract issue with which it disagrees. That is not an appropriate ground for this Court's review. See *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (this Court does not review, "save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts"); accord *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). Nor is Alliance's contention that the Seventh Circuit made "factual assumptions" that were "incorrect" (Pet. at 14) a viable ground for review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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